

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-01789-smb

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5 SECURITIES INVESTMENT PROTECTION CORPORATION,

6 Plaintiff,

7 v.

8 BERNARD L. MADOFF INVESTMENT SECURITIES,

9 LLC, ET AL.,

10 Defendants.

11 - - - - - x

12 Adv. Case No. 10-04311-smb

13 In the Matter of:

14 IRVING H. PICARD, TRUSTEE FOR THE LIQUIDATION OF

15 BERNAND L. MADOFF,

16 Plaintiff,

17 v.

18 ANDREW COHEN, ET AL.,

19 Defendants,

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1 United States Bankruptcy Court
2 One Bowling Green
3 New York, New York
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5 September 30, 2015

6 10:06 a.m.
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9 B E F O R E :

10 HON STUART M. BERNSTEIN

11 U.S. BANKRUPTCY JUDGE
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1 Conference regarding certain parties' request to intervene

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25 Transcribed by: Sherri L. Breach

1 A P P E A R A N C E S :

2 BAKERHOSTETLER

3 Attorneys for Trustee, Irving Picard

4 45 Rockefeller Plaza

5 New York, New York 10111

6

7 BY: NICHOLAS J. CREMONA, ESQ.

8 KEITH R. MURPHY, ESQ.

9

10 PRYOR CASHMAN, LLP

11 Attorneys for Defendants

12 7 Times Square

13 New York, New York 10036

14

15 BY: RICHARD LEVY, JR., ESQ.

16

17 SECURITIES INVESTOR PROTECTION CORPORATION

18 Attorneys for SiPC

19 1667 K. Street N.W, Suite 1000

20 Washington, D.C. 20006

21

22 BY: KEVIN H. BELL, ESQ.

23

24

25

1 LOEB & LOEB, LLP

2 Attorneys for various defendants

3 345 Park Avenue

4 New York, New York 10154

5

6 BY: P. GREGORY SCHWED, ESQ.

7

8 BAKER & MCKENZIE, LLP

9 Attorneys for Defendants

10 815 Connecticut Avenue, N.W.

11 Washington, D.C. 20006

12

13 BY: RICHARD A. KIRBY, ESQ.

14

15 LEWIS MCKENNA

16 Attorneys for Andrew Cohen

17 82 East Allendale Road, Suite 6

18 Saddle River, New Jersey 07458

19

20 BY: PAUL LEWIS, ESQ.

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 Madoff.

4 MR. SCHWED: Good morning, Your Honor. Greg
5 Schwed of Loeb & Loeb representing various defendants in the
6 adversary proceeding brought by the trustee.

7 We're here under the litigation procedures order
8 on a preliminary conference with respect to our request to
9 move to -- for a very limited intervention in a -- in the
10 pending adversary against Mr. Andrew Cohen. I say limited
11 because we're not seeking to intervene with respect to any
12 of the trial proceedings or Mr. Cohen's attorney's
13 presentation of facts unique to his case.

14 We feel our hand has been forced because, for
15 reasons known to the trustee and his counsel, it appears as
16 if Mr. Cohen's case is going to be the first case on which
17 final judgments will be entered on two critical issues for
18 our clients. And the issues involve hundreds of millions of
19 dollars of potential swing.

20 The Cohen case itself is a very small case in the
21 scheme of --

22 THE COURT: Not to Mr. Cohen.

23 MR. SCHWED: Not to Mr. Cohen, but, again, he is
24 an individual client and the exigencies of representing an
25 individual in a case like this are very taxing. And Mr.

1 Cohen's attorneys are here and they can explain the kind of
2 pressure that's on to resolve this type of case.

3 One of the factors under a Rule 24 intervention is
4 whether the interests are adequately represented by the
5 existing defendant. And this is in no way impugning Mr.
6 Cohen's counsel who are excellent, but, again, these are
7 complex issues. They are both ones where many different
8 questions can be raised about them. And when it goes up to
9 the -- both to the District Court and to the Circuit Court
10 -- so essentially two levels of potential appeal -- it's
11 really not fair either to Mr. Cohen's counsel or to us to
12 expect Mr. Cohen and his counsel to raise and fully amplify
13 and discuss all these issues.

14 But --

15 THE COURT: What issues do you want to intervene
16 on?

17 MR. SCHWED: Sure. One issue is the value issue.
18 And --

19 THE COURT: That's been -- that's been decided in
20 three different cases.

21 MR. SCHWED: Your Honor, quite under -- I
22 understand that. And our client was involved in Judge --
23 the Judge Rakoff decision. So -- and quite thoroughly and
24 with a very thoughtful opinion, as was Your Honor's. We
25 weren't involved in the June 2nd or the proceedings that led

1 to Your Honor's June 2nd opinion. There's no question that
2 that issue has been decided.

3 THE COURT: So what is there to intervene on?

4 MR. SCHWED: The -- it's really to preserve our
5 rights in the Second Circuit where ultimately this issue, we
6 would be hoping to get the Second Circuit to take a fresh
7 look at it. And that would be --

8 THE COURT: I understand that. But why can't you
9 raise that in your own cases?

10 MR. SCHWED: Well, we could.

11 THE COURT: You think I'm going to decide value
12 for a fourth time now?

13 MR. SCHWED: No, Your Honor. I mean, for -- as
14 far as we're concerned if Your Honor simply said denied on
15 the basis of the June 2nd opinion and Judge Rakoff's prior
16 opinion, that would be fine.

17 THE COURT: But how does that help you?

18 MR. SCHWED: It --

19 THE COURT: You're going to appeal a judgment in
20 Mr. Cohen's case?

21 MR. SCHWED: If we're allowed to intervene we
22 would be a party who is entitled to have that issue decided
23 by the Second Circuit.

24 You see, Your Honor, I think it's a very pragmatic
25 issue.

1 THE COURT: I understand the importance of the
2 issue, but I'm certainly not going to decide it a fourth
3 time in the context of Mr. Cohen's case. I assume it's been
4 raised in your own cases, and when, as and if your cases are
5 tried and you lose, you can raise that issue.

6 MR. SCHWED: But, Your Honor, I think the -- what
7 we're looking at is we're trying to look at this
8 realistically and I think that's what Rule 24 really
9 requires, which is as a practical matter what will happen if
10 this pure issue of law -- and that's the way it was framed
11 and decided by Judge Rakoff and I believe Your Honor --

12 THE COURT: Did anybody seek interlocutory leave
13 to appeal Judge Rakoff's decisions to the --

14 MR. SCHWED: We did --

15 THE COURT: -- Second Circuit?

16 MR. SCHWED: -- seek, Your Honor --

17 THE COURT: And what happened?

18 MR. SCHWED: -- if he denies interlocutory appeal.
19 So what our concern is, it's a very practical one. If this
20 goes up to the Second Circuit and it's -- and Mr. Lewis, Mr.
21 Cohen's counsel, has said he certainly plans to appeal it.
22 Unless we have --

23 THE COURT: Well, he hasn't lost yet.

24 MR. SCHWED: Pardon.

25 THE COURT: He hasn't lost yet.

1 MR. SCHWED: He has not lost yet, but, again,
2 we're trying to speak, you know, realistically here.
3 Assuming he does lose on the issue and he goes up on appeal,
4 we won't have a seat at the table there. The trustee has
5 been able to select this case and pick off and over -- I
6 won't say overmatch because Mr. Cohen's counsel are
7 excellent. But a case where the stakes are very minimal,
8 relatively speaking, and now instead of embracing the chance
9 to have a fair fight with our group of five law firms who
10 have a lot at stake, the trustee is trying to stiff arm us
11 and make it an unfair fight.

12 And there's case law, by the way, that -- in the
13 Rule 24 context which says that that's just inappropriate
14 from the Seventh Circuit saying that -- I can even read you
15 an excerpt from it. It's -- this is from Security Insurance
16 Company versus Shipwright (ph), a Seventh Circuit case from
17 1995. The Court said the insurance company opposed
18 LaSalle's petition to intervene because it wanted a quick,
19 unopposed adjudication. It wanted to play the Washington
20 Generals and get out of town with a quick win. The District
21 Court wisely allowed a more worthy opponent to get into and
22 onto the Court. The Washington Generals were the Harlem
23 Globetrotters traditional patsy opponents.

24 Again, this is not to say that that's the case
25 with Mr. Cohen's counsel, but they're obviously in -- not in

1 a position to throw the types of resources --

2 THE COURT: Can I ask a question?

3 MR. SCHWED: Yes.

4 THE COURT: Suppose that trial was scheduled in
5 Bayou (ph) --

6 MR. SCHWED: In --

7 THE COURT: -- in Bayou Ponzi Scheme case --

8 MR. SCHWED: Yes.

9 THE COURT: -- and the same issue arose, would you
10 have the right to intervene in that case?

11 MR. SCHWED: Well, it's possible. I mean, the
12 standards under 24 -- and we can go through those. I mean,
13 I'm -- we're prepared to file the motion. But I'm certainly
14 happy to just go through the standards.

15 Basically, under 24(a)(2), which would be our
16 primary desire, intervention of right --

17 THE COURT: You're arguing that you have an
18 intervention as a matter of right?

19 MR. SCHWED: Both, Your Honor, both intervention
20 of right and permissive. I'm happy to go through it.

21 THE COURT: What statute gives you the right to
22 (indiscernible)?

23 MR. SCHWED: I'm sorry.

24 THE COURT: What's the basis of your intervention
25 as a matter of right?

1 MR. SCHWED: Okay. Let's start with the rule,
2 which reads, "On timely motion the Court must permit anyone
3 to intervene who claims an interest relating to the property
4 or transaction that's the subject of the action."

5 Well, that language was changed in the 1966
6 amendments to the rules to make it quite broad. And the --
7 both the secondary treatises and the Second Circuit itself
8 have said that's -- if you have an interest, and those
9 interests can be environmental interests. I mean, there's
10 just all kinds of questions as to whether a party actually
11 has Article 3 standing to intervene, and yet in public
12 interest cases that's construed broadly.

13 Here, it's just a flat out monetary interest. We
14 have hundreds of millions of dollars potentially riding on
15 the resolution of these two issues.

16 THE COURT: But you have your -- I come back to
17 this. You have your own cases in which you can raise these
18 arguments if you lose. So why do you have to intervene in
19 this case other than to get a faster track to the Second
20 Circuit?

21 MR. SCHWED: Because I think as a practical matter
22 if this goes to the Second Circuit -- and let's just say for
23 the sake of argument we could have made a difference had we
24 been there, and the Second Circuit --

25 THE COURT: That's a big assumption.

1 MR. SCHWED: Pardon?

2 THE COURT: That's a big assumption.

3 MR. SCHWED: It's a huge assumption. We're not so
4 arrogant as to say that's --

5 THE COURT: I'll hear from Cohen's counsel as to
6 why he can't adequately represent his client's interests on
7 this. But go ahead.

8 MR. SCHWED: All a fair point. But on that
9 assumption if it's decided as it was by Judge Rakoff as a
10 matter of law, then it will apply to us as a matter of stare
11 decisis. And we mentioned -- in other words, it will really
12 be game over, you know. In the real world there won't -- it
13 won't matter that we didn't have a seat at the table in the
14 Second Circuit because the trustee would be able to say with
15 complete justification, well, you know, here it is. Here
16 are the facts. Value, just as Judge Rakoff --

17 THE COURT: But that's stare decisis. If you
18 raise the same arguments that Mr. Cohen raises and Mr. Cohen
19 lost on those arguments, why should you have another shot at
20 that?

21 MR. SCHWED: Well, the point --

22 THE COURT: You said you could do a better job
23 (indiscernible) arguments and that's the basis for
24 intervention?

25 MR. SCHWED: Your Honor, that's -- the case law

1 supports that. That's one of the criteria under --

2 THE COURT: Okay. How do I --

3 MR. SCHWED: -- Rule --

4 THE COURT: -- determine whether the existing
5 parties -- and maybe this goes to the merits of the motion,
6 but I'm curious how I determine whether the existing parties
7 adequately represent your interests on the question that
8 you've identified?

9 MR. SCHWED: Well, I can -- I think I can help a
10 little bit. I mean, there's case law -- again, we'll cite
11 this if we're permitted to file a brief. The Glancey (ph)
12 versus Toutman (ph) case, 373 F.3d 656 from the Sixth
13 Circuit in 2004. The Court ruled that an existing party did
14 not adequately represent the absentee, the proposed
15 intervener, because, among other things, the existing party
16 would have a similar interest in fighting to invalidate it,
17 but the intense -- "the intense (indiscernible) interests
18 differs from the absentee because the absentee controls 500
19 times more shares."

20 THE COURT: So it's just a numbers game?

21 MR. SCHWED: No. It's really -- again, it's a
22 practical consideration. And the word practical is used in
23 the statute that -- let's assume that it was a \$50,000 case
24 for Mr. Cohen instead and he really -- Mr. Cohen had said,
25 I've already spent \$10,000 defending this. I really -- I

1 just don't want you guys to go up there and spend another
2 nickel on this whole crazy value and prejudgment interest
3 stuff. I can't afford it. I'm only being sued for \$50,000.

4 THE COURT: But it's a million dollar case and he
5 appears to be fighting it.

6 MR. SCHWED: Here's -- Your Honor, that's --
7 you're right. And that's -- but one of the criteria is
8 indeed adequacy of representation and there is case law also
9 from the First Circuit is to show that inadequate
10 representation is that his interests are sufficiently
11 different "in kind or degree from those of the named
12 parties."

13 So, again, we're sort of at a loss to understand
14 why the trustee doesn't want a fair fight on this. This
15 issue --

16 THE COURT: You know, you keep saying that, but it
17 is a fair fight. The trustee brought a case and Mr. Cohen
18 has defended it strenuously. So why isn't that a fair
19 fight?

20 MR. SCHWED: Well, for one thing, in this case we
21 have a pattern of having consolidated briefing on issues
22 that affect all --

23 THE COURT: So why wasn't this raised in the
24 consolidated briefing? Well, actually, the antecedent debt
25 issue was raised several times, but let me move on to the

1 interest issue.

2 MR. SCHWED: Sure.

3 THE COURT: Why wasn't that raised in the
4 consolidated briefing? And what is it that you want to
5 brief?

6 MR. SCHWED: Well, Your Honor, I think our
7 position -- and we -- we don't believe this issue has been
8 decided yet in this case. It's an important issue. We
9 don't think there are meaningful differences among good
10 faith defendants. And, by the way, Mr. Cohen --

11 THE COURT: Are you going to argue that as a
12 matter of law the trustee cannot recover prejudgment
13 interest against a good faith defendant?

14 MR. SCHWED: Your Honor, I don't actually --

15 THE COURT: Or are you going to argue that under
16 the facts and circumstances of each particular case maybe he
17 can, maybe he can't?

18 MR. SCHWED: Your Honor, I confess I have not
19 thoroughly looked at this issue.

20 THE COURT: Well --

21 MR. SCHWED: But I -- but in answer --

22 THE COURT: Let me -- because if it's a facts and
23 circumstances issue, then it depends on the facts of each
24 particular case.

25 MR. SCHWED: Well, but does it in the same -- if

1 you have a good faith defendant, what are the meaningful
2 facts? The meaningful facts are when the transfer occurred
3 and do you measure interest from the date of the transfer or
4 from the date that the complaint was filed, and what's the
5 interest rate.

6 Now we don't believe those facts are -- there may
7 be individual -- obviously, there are differences in facts
8 in terms of did one defendant get its payment in 2006 and
9 the other in 2008. Those are distinctions without
10 differences. They're not meaningful, we don't believe, for
11 the inquiry about prejudgment interest.

12 What is -- what is meaningful is, are these good
13 faith defendants, and all of our clients are good faith
14 defendants. Mr. Cohen is a good faith defendant. And then
15 essentially legal issues: Do you measure interest from the
16 date of the transfer in setting with the good faith
17 defendant or from the date of the demand; is it appropriate
18 in this setting to ask for prejudgment interest at all from
19 a good faith defendant; and what interest rate do you use.
20 It's difficult for us to see what different criteria would
21 apply here.

22 I mean, you can say, yes. These defendants are
23 different because they got their money in 2004 and you --
24 these other guys got their money in 2006. But how does that
25 have any effect on the legal principles that drive whether

1 or not to grant prejudgment interest. We don't see it. And
2 certainly the trustee hasn't raised any point to that
3 effect.

4 And, in fact, the only case we cite in letter that
5 I sent to -- that our group sent to the Court was the Oneida
6 Nations case, a Second Circuit case from 1984. There were
7 only two issues that we cited that case for and the trustee
8 doesn't address either one of them. The first was that the
9 stare decisis effect of an appellate case is by itself
10 sufficient grounds for intervention of right. That's --

11 THE COURT: But this case I'm just going to report
12 and recommend. It's not going to have any stare decisis
13 effect. Objections can be filed in the District Court and
14 which they novo review. So there's no stare decisis effect.

15 MR. SCHWED: But if we don't at least preserve our
16 rights to intervene at the Bankruptcy Court level, there's a
17 good chance that at the District Court level, let alone the
18 Second Circuit level they'll say, sorry, you have to have
19 preserved your rights at all level or you -- levels or you
20 waive it.

21 THE COURT: So if I deny your motion, haven't you
22 preserved your right? Then you can seek to -- for leave to
23 intervene when, as and if there are objections and responses
24 to it, proposed findings of fact and conclusions of law.

25 MR. SCHWED: Well, Your Honor, we would prefer

1 that we have the right to intervene. We think that's the
2 right ruling under the circumstances.

3 THE COURT: All right. Let me hear from --

4 MR. SCHWED: Certainly.

5 MR. CREMONA: Your Honor, if I may --

6 THE COURT: Wait. Let me hear everybody from this
7 side.

8 MR. CREMONA: Well, Your Honor, if I may, that was
9 a lot of ground covered. I would like to rebut some of
10 those points before everyone gets an opportunity to speak if
11 --

12 THE COURT: Well --

13 MR. CREMONA: -- Your Honor --

14 THE COURT: Well, then you're going to be up and
15 down. Let me hear --

16 MR. CREMONA: I --

17 THE COURT: -- if anybody has anything to add.

18 MR. KIRBY: Go ahead. You -- please. You're
19 counsel.

20 MR. LEWIS: Yes, Your Honor. I am counsel for
21 Andrew Cohen. And we join in this request for intervention.

22 THE COURT: All right. Tell me why you can't
23 adequately represent the interests of your client, I guess,
24 and everybody else on --

25 MR. LEWIS: I don't --

1 THE COURT: -- this (indiscernible).

2 MR. LEWIS: I don't think -- I think this whole
3 thing is a tactical attempt on the part of the trustee. My
4 client --

5 THE COURT: It sounds like a tactical attempt to
6 get to the Second Circuit on the first case by everybody
7 else. That's what it sounds like.

8 MR. LEWIS: So we're going to be the test case.
9 My client, okay --

10 THE COURT: Well, some -- I told you when you --
11 the first time you came here, somebody's got to be first.

12 MR. LEWIS: Someone's going to be first.

13 THE COURT: Right.

14 MR. LEWIS: Someone has to be first in all the
15 other issues, Your Honor. Okay. But on all --

16 THE COURT: Well, a lot of those --

17 MR. LEWIS: -- the other issues like --

18 THE COURT: -- a lot of those issues --

19 MR. LEWIS: -- the two-year issue --

20 THE COURT: A lot of those issues have been
21 decided. I'm not going to --

22 MR. LEWIS: Yes. They have been decided, but
23 they've been decided by collective consolidated briefs as
24 Your Honor has indicated. This way --

25 THE COURT: Okay. But --

1 MR. LEWIS: -- this way, Your Honor, we are going
2 to be the only person, okay, the only party. We're going to
3 go up to the -- we're going to go up to Judge Rakoff. Judge
4 Rakoff is going to give us a decision on the value and then
5 we go to the Second Circuit --

6 THE COURT: You got the -- you got his decision on
7 value.

8 MR. LEWIS: Fine. But we have -- but we have to
9 wind our way through the Court.

10 THE COURT: I understand all that. But tell me
11 why you can't adequately represent everybody's interest on
12 the --

13 MR. LEWIS: We --

14 THE COURT: -- question of whether or not
15 fictitious profits are --

16 MR. LEWIS: We've been representing --

17 THE COURT: Will you let me finish?

18 MR. LEWIS: I'm sorry, Your Honor. I'm sorry,
19 Your Honor.

20 THE COURT: Tell me why you can't adequately
21 represent the interests of everybody on the question of
22 whether the payment of fictitious profits are supported by
23 consideration, antecedent debt or otherwise.

24 MR. LEWIS: Okay. Let me explain. We've been
25 representing Andrew Cohen since the case began. Okay. We

1 have been -- we have charged him approximately \$25,000 in
2 five years of litigation. Okay. We are now looking at
3 proceedings that are probably going to be in the hundreds of
4 thousands of dollars. We don't -- he doesn't have the
5 capacity to do that. Not only have we tried to --

6 (Phone rings)

7 MR. LEWIS: I'm sorry, Your Honor.

8 Not only do we not have the capacity, he hasn't
9 even paid that money.

10 And these people -- these people from the trustee,
11 they understand that. We went through this mediation. They
12 know the condition he is in. Yes, he has some money, but he
13 worked for it. He worked for Madoff. He worked on the
14 trading desk. He's a good faith defendant. He left the
15 company back in 2002. He wanted to go into a different
16 lifestyle. He really was not working in any kind of money-
17 making occupation. All he is right now is an adjunct
18 professor on a part-time basis in a university down in
19 Virginia.

20 He doesn't have the wherewithal and we don't have
21 the wherewithal to spend a quarter of a million dollars or
22 something in that range from here on in all the way up to
23 the Second Circuit. I don't think it's fair to us. I don't
24 think it's fair to Mr. Schweb's client or the other 20
25 clients that are listed or the other hundreds of clients

1 that are involved because when we go up to the Second
2 Circuit, these issues are going to be stare decisis with
3 these people. And that's --

4 THE COURT: Well, it will be more than that
5 depending on how the Second Circuit decides it.

6 MR. LEWIS: It will be worth -- well --

7 THE COURT: Because that's stare decisis to the
8 Second Circuit. The Second Circuit is reviewing the
9 decision of the District Court.

10 MR. LEWIS: They're -- yes. They're reviewing the
11 decision and what they -- and the holding of Judge Rakoff is
12 going to be what's at issue.

13 (Phone ringing)

14 MR. LEWIS: I'm sorry, Your Honor.

15 THE COURT: Would you turn off your phone, please?

16 MR. LEWIS: Yes. I certainly will. I don't even
17 know why it's on.

18 THE COURT: Go ahead.

19 MR. LEWIS: All right. So I -- I -- these issues
20 are going to be -- the issue that we're going to be
21 deciding, that's going to be decided for us, is going to be
22 decided by the Second Circuit. We're the first one. Okay.
23 Do you think the Second Circuit is going to make different
24 decisions for different people on the question of antecedent
25 debts or value or taxes or any of these --

1 THE COURT: Probably --

2 MR. LEWIS: -- offsets?

3 THE COURT: Probably not on the legal issues.

4 MR. LEWIS: Why not? The legal issue is whether
5 this -- it's only principal is value or whether there are
6 other offsets under state law that are in question here.
7 And we're entitled to make those things.

8 So what am I -- what am I going to do during the
9 trial? We're going to offer proof. They're going to deny
10 it. I understand, Your Honor. We're going to go up to
11 Judge Rakoff. He may go through the same proceeding. I
12 don't know exactly what kind of proceeding he's going to
13 have. And then I'm going to go to the Second Circuit. And
14 I don't know how long we can go on with this case. I mean,
15 but we will. We now will because we'll do it for them as
16 well as for ourselves.

17 THE COURT: Well, are they going to pay you to do
18 it?

19 MR. LEWIS: Will they what?

20 THE COURT: Are they going to pay you to do it?
21 What's going to --

22 MR. LEWIS: No. No one has --

23 THE COURT: -- (indiscernible) --

24 MR. LEWIS: No one has said they're going to pay
25 me anything.

1 THE COURT: All right.

2 MR. LEWIS: In fact, it may work the other way.

3 But --

4 THE COURT: Your clients are going to pay them?

5 MR. LEWIS: Maybe. I don't know. But we -- it's
6 ridiculous that these people cannot intervene when all the
7 other issues, all the other issues have been decided and
8 argued on a collective basis allowing the group of
9 defendants in this case to have a common voice. There are
10 common issues in this.

11 THE COURT: But they want to intervene at least on
12 the antecedent debt issue on which they've already been
13 heard. So what's -- what would the purpose be of their
14 intervening on the antecedent debt issue other than to have
15 an immediate right to appeal, if that's the case from an
16 adverse judgment by the District Court because I can't enter
17 a final judgment --

18 MR. LEWIS: They'll --

19 THE COURT: -- in this.

20 MR. LEWIS: They'll be able to participate at --
21 in the proceedings before Judge Rakoff which may be fairly
22 limited. I understand that. But the -- Judge Rakoff,
23 actually, he said he -- there were several issues that he
24 didn't even address because he hadn't withdrawn the
25 reference. So those issues may -- may come up before Judge

1 Rakoff depending on how he feels about that.

2 I understand that the overwhelming argument is
3 that this is SIPA. This isn't bankruptcy. This is SIPA.
4 So we -- we take principal and that's the only offset you
5 can get. That's not the only offset for people who've --
6 who are the victims of fraud in New York State. And we are
7 the victims of fraud. And my client is the victim of fraud.
8 And my client doesn't have the money because (indiscernible)
9 what he had is gone. His pension fund, he worked for this
10 company. This was his pension fund. This is the only money
11 he was going to have.

12 THE COURT: All right. Thank you.

13 Mr. Kirby.

14 MR. KIRBY: Thank you, Your Honor. Richard Kirby
15 from now Baker & McKenzie. Thank you, Your Honor.

16 There are two issues that I would like to
17 emphasize here. The group is seeking to intervene on a
18 common legal issue, which is a point that we raised back in
19 February of 2014. And what we said to Your Honor at that
20 time, and you may recall the hearing that was -- I think it
21 was on Valentine's Day of 2014, that we raised the issue
22 because it was important to the group that we be heard on
23 common issues.

24 At that time the trustee agreed that on common
25 legal issues they should be heard. We're seeking a right to

1 inter -- to file a motion to intervene, both -- and brief
2 the issue of our right to intervene both under intervention
3 of right as Mr. Schweb identified for the Court and under
4 24(b), permissive intervention because of a common legal
5 issue.

6 And the two common legal issues are the question
7 of value. With all due respect, Your Honor, I think it
8 needs to be reconsidered in light of --

9 THE COURT: I'm not going to reconsider it unless
10 you show me that there's a -- some authority that has since
11 been decided.

12 MR. KIRBY: Okay. Your Honor --

13 THE COURT: But you don't have to argue that now.
14 I'm just --

15 MR. KIRBY: I'm not going to argue the point now
16 --

17 THE COURT: I'm just telling you -- let me just
18 stop you. I just re-read my decision.

19 MR. KIRBY: Right.

20 THE COURT: I spent 16 pages talking about
21 antecedent debt and I'm just not going to reconsider that
22 unless something new has been decided that's highly
23 persuasive or mandatory authority.

24 MR. KIRBY: Okay.

25 THE COURT: So you've had your day in court on

1 that.

2 MR. KIRBY: All right. With due respect then,
3 Your Honor, this case, as you said, is going to be on post-
4 findings of fact and conclusions of law. We'll go to a
5 District Judge. It will not be before Judge Rakoff and the
6 reason is, is because the trustee has taken the position
7 that on other issues in which Judge Rakoff has withdrawn the
8 reference, he was the judge of original jurisdiction and,
9 therefore, it's going to go to a different district Judge.
10 We want to be parties to that proceeding. The first step in
11 that process is to seek leave to intervene here now so that
12 we have an opportunity to be heard before a different
13 district judge on an issue that is an issue of first
14 impression.

15 Now this is an issue of first impression in the
16 SIPA case. And the issues are very different from issues --
17 case like Bayou and Dunell (ph), and the reason is, is
18 because these were customers that were broker/dealer,
19 conceded good faith customers of a broker/dealer.

20 And, therefore, we think that we should be
21 entitled to at least file that motion. You should consider
22 it in due course. We would do it on a timely basis so that
23 we can be heard if -- at the trial. We're prepared to file
24 the -- that motion by the end of the week if the Court asks
25 for it on that kind of schedule so you will have an

1 opportunity to consider the motion.

2 THE COURT: Now how many motions are going to be
3 filed, like how many briefs am I going to get on this issue?

4 MR. KIRBY: There's going to be one consolidated
5 brief from our group that would --

6 THE COURT: So I'm not going to get another 20 or
7 30 briefs like I got on the omnibus motion?

8 MR. KIRBY: Your Honor, we reached out to all of
9 the members of the common defense group that we are aware of
10 and it will be a single brief on the question of -- on the
11 question of intervention, which is the first step in the
12 process because we think we're entitled to be a party before
13 the District Court on a common legal issue. And we think --
14 and if the case -- and if we cannot persuade the District
15 Court to -- then we think that we're entitled to be heard
16 before the circuit as a party.

17 I just want to emphasize something on the issue of
18 interest, prejudgment interest which the Court raised a
19 question about. That's not an issue that has been decided
20 in this case. There are two, what I view fundamental legal
21 issues on that question, the question of interest rate, and
22 the timing. Everything else is going to be a factual issue.
23 Okay.

24 But the interest rate, whether that interest rate
25 is, as the trustee claims, the New York State rate, we're

1 seeking the federal post-judgment interest rate which is
2 what's -- you know, we think is the proper answer to that
3 question, and the timing as to whether it comes from the
4 date of the demand or some earlier prompt. Those are issues
5 that are -- will be a first impression. We also think it
6 would affect everybody and it's a common issue.

7 And so we go back to the issue -- go back to the
8 point that we raised back in February 2014. We ask the
9 Court for an opportunity to be heard on common legal issues.

10 THE COURT: All right. Let me --

11 MR. KIRBY: Thank you.

12 THE COURT: Let me hear (indiscernible).

13 MR. LEVY: I'm sorry, Your Honor. I have one
14 point to add to Mr. Kirby's comments. Richard Levy from
15 Pryor Cashman.

16 We've all been involved in cases in which there
17 has been numerous avoidance actions brought by a trustee.
18 I've been involved in plenty. I'm sure Your Honor is aware
19 of plenty in which a common set of procedures is established
20 at the outset so that common issues will be handled on a
21 common basis in order --

22 THE COURT: Which has been done in this case.

23 MR. LEVY: It has not been done here, Your Honor.
24 It's been done on an ad hoc basis by motions to various
25 courts. It hasn't been done before you.

1 Back in 2010 when the trustee was before Judge
2 Lifland and establishing the litigation procedures order
3 before any of us was a party to this proceeding, there were
4 questions in the proceeding before Judge Lifland about
5 whether or not matters should proceed on a consolidated
6 basis. I would like to read to you Mark Hirschfield, Mr.
7 Cremona's partner, his comment to Judge Lifland near the end
8 of the hearing because I think it's telling about the
9 trustee's position here.

10 "One thing is" -- and this was in the hearing that
11 was held on November 10th, 2010 at pages 50 and 51:

12 "One thing in terms of the coordination of
13 briefing and whatnot, there's nothing in these procedures
14 that prevents a group of defendants from getting together to
15 file a common motion or a common briefing on these issues.
16 And, in fact, we agree that might make sense. We may use
17 that ourselves on certain issues with regard to summary
18 judgments.

19 "So these procedures don't preclude it. And we
20 think if they want to do it that will be fine to file common
21 motions to dismiss or common summary judgment motions or
22 likeness."

23 That's exactly what we're asking --

24 THE COURT: You're not seeking to file a motion to
25 dismiss or a summary judgment --

1 MR. LEVY: We are asking --

2 THE COURT: -- you're asking to --

3 MR. LEVY: -- to participate in --

4 THE COURT: -- you're seeking to --

5 MR. LEVY: -- dispositive proceedings, Your Honor.

6 THE COURT: Let me finish. You're seeking to
7 intervene in somebody else's trial that's about to go
8 forward.

9 MR. LEVY: That's exactly right, Your Honor --

10 THE COURT: It's different.

11 MR. LEVY: -- on dispositive issues. And, in
12 fact, Your Honor, we have different twists to the antecedent
13 debt issues that have been raised previously and will be
14 raised hopefully in the next proceedings. We'll get into
15 those in the intervention motion. But there are twists that
16 neither Your Honor nor any other court has yet ruled upon.
17 And we think it's appropriate that we have an opportunity
18 and that they be heard so that they can be addressed on a
19 consolidated basis.

20 THE COURT: Why weren't they raised previously?

21 MR. LEVY: Your Honor, nobody has addressed the
22 issue of whether or not an obligation owed by the debtor
23 that existed before 2002 that is beyond the reach of any
24 avoidance statute, how that obligation is treated in the
25 context of a defendant's defense that it constitutes value.

1 Nobody has address that issue. You haven't. Judge Rakoff
2 didn't. No other judge has.

3 THE COURT: But does that issue arise in Mr.
4 Cohen's case?

5 MR. LEVY: It will, Your Honor.

6 THE COURT: I thought -- I thought that all of the
7 transfers occurred in 2007 or 2008.

8 MR. CREMONA: If I may, Your Honor, there are no
9 obligations counts present in the complaint in the Andrew
10 Cohen case. Those issues will not arise. It's --

11 MR. LEVY: If there was --

12 MR. CREMONA: That's irrelevant to that
13 proceeding.

14 MR. LEVY: If there was an account opened prior to
15 an avoidance period and it constitutes an obligation and
16 it's beyond the reach of an avoidance, what is its effect,
17 Your Honor? That --

18 THE COURT: What is --

19 MR. LEVY: What is the effect, Your Honor, of that
20 obligation? That is an issue that must be decided.

21 THE COURT: I don't think I understand you right.
22 All right. Let me hear from the trustee at this
23 point.

24 MR. CREMONA: Thank you, Your Honor. Nicholas
25 Cremona, BakerHostetler on behalf of the trustee.

1 At the outset I would say thank you, Your Honor,
2 for accommodating us on such short notice. A lot of ground
3 was covered so I would appreciate a little latitude in
4 responding.

5 One of the things that my colleague, Mr. Levy,
6 just raised is a transcript from the November 10, 2010
7 hearing. I would like to give Your Honor a copy if you
8 would like because I think it's relevant to some of the
9 things that Mr. Levy just said, some of which are that this
10 was done on an ad hoc basis. It was done, you know, without
11 participation of these folks and these guys weren't in the
12 case yet.

13 I think you can, just by perusing the transcript,
14 see that Greg Schwed and Loeb & Loeb were present. SNR
15 Denton was present. Milberg, LLP also present, here a
16 signatory to the letter was present at that hearing.

17 I also would point out to Your Honor that at
18 Docket Number 3109, Greg Schweb filed an objection to those
19 procedures.

20 Similarly at Docket 3112, a Ms. Nevel (ph) of SNR
21 Denton, also a signatory to this letter, objected to those
22 procedures.

23 And lastly at Docket Number 3113, Mr. Landers (ph)
24 of Milberg, LLP filed an objection to those procedures. And
25 part of that objection, Mr. Landers and Milberg attached

1 competing avoidance procedures.

2 So to say that this was done on an ad hoc basis
3 without the input of many parties is just untrue. And Judge
4 Lifland, after careful consideration, entered that order and
5 those procedures, taking into account the various arguments
6 made by parties and tailored those procedures to reflect
7 those concerns.

8 So -- and I think we -- you know, to say that that
9 was entered lightly is just not true. And the fact of the
10 matter is that was entered at a time when we had a thousand
11 avoidance actions and it was contemplated as a way to
12 administer those cases in a fashion that would work and,
13 frankly, Your Honor, it has worked.

14 And when I went back to look at the transcript
15 from the 2/14 hearing, as Mr. Kirby pointed out, at that
16 point in time we were discussing having 800 avoidance
17 actions. As we stand here right now today we have 515 and
18 that's as a result of those very procedures that they now
19 seek to circumvent that are working quite well and have
20 allowed us to resolve over 300 cases --

21 THE COURT: Well, they're not seeking to
22 circumvent the procedures. They're just seeking leave to
23 intervene in the trial and that's the issue before me.

24 MR. CREMONA: Well, Your Honor, respectfully --

25 THE COURT: They're following procedure. They're

1 --

2 MR. CREMONA: Well, respectfully, though, the
3 procedure is that the cases should proceed on their own
4 track as Your Honor also said at 2/14, and that would mean
5 that each case should complete discovery, go to mediation,
6 have a failed mediation and then be scheduled for trial.

7 I would like to also address, which I took umbrage
8 with two statements by my colleagues that we've handpicked
9 this case. That's just flat untrue, Your Honor. The cases
10 have proceeded at a pace under the procedures.

11 Mr. Cohen, unlike my other colleagues, chose not
12 to file multiple motions and did not get three prior bites
13 at the apple. His case proceeded as -- on parallel tracks.
14 He completed discovery before them. They've delayed their
15 cases. That's why they're not going first. That's the
16 result of them participating in Rife (ph) in 2012 and that's
17 Milberg, Pryor Cashman and Denton.

18 All of those cases, as Your Honor noted in your
19 good faith opinion on June 2 -- as you said you talked
20 extensively -- are bound by the law of the case on
21 antecedent debt. But yet they want a fourth bite at the
22 apple now today.

23 So all of those parties participated in -- on
24 multiple funds again in the antecedent debt matter and then
25 again in the omnibus proceeding before you.

1 I think it's also important to focus on, I took a
2 look at the 57 cases that they're seeking to join to this
3 proceeding. They are at various procedural postures, 26 of
4 which were party to your omnibus proceeding, just answered
5 either in August or September; 20 of them don't even have a
6 case management order on file. They're not in discovery.

7 Now this brings us back to our conversation that
8 we had on 2/14/14 when --

9 THE COURT: Valentine's Day.

10 MR. CREMONA: -- Your Honor said -- what's that?

11 THE COURT: Valentine's Day.

12 MR. CREMONA: Exactly. When Your Honor said this
13 case simply can't proceed at the pace of the slowest case.
14 That is precisely what your -- I would assume you were
15 concerned about. We're here 18 months later and we have
16 cases that are in the (indiscernible) stages trying to
17 dictate the pace of the case that's been trial ready since
18 March.

19 THE COURT: Well, they're not going to intervene
20 in the trial of the case.

21 MR. CREMONA: But -- sorry.

22 THE COURT: So -- and that's -- and that I
23 wouldn't allow. They just want to intervene and essentially
24 what -- it probably would be post-trial briefing depending
25 on the outcome on limited issues.

1 MR. CREMONA: Just to touch on that, Your Honor, I
2 think, as Your Honor already noted, we're not revisiting
3 antecedent debt so that eliminates the one issue --

4 THE COURT: But Mr. Levy thinks we are.

5 MR. CREMONA: Well, as Your Honor pointed out, I
6 think he's had three opportunities to raise these unique
7 twists that he eludes to that no one else knows about and
8 hasn't done so at this point. I would argue they're waived.

9 And I would argue if he wants to raise them, then
10 he has to put forth 57 different factual scenarios that
11 would demonstrate why the antecedent debt law of the case
12 doesn't apply. And if he wants to do that, that would cause
13 an inordinate amount of prejudice and delay to the trustee
14 and the net loser victims, and I don't think he can do it in
15 the manner he's saying by one consolidated brief.

16 And that brings me to -- Your Honor, to the
17 prejudgment interest issue which I would like to focus on
18 something that Your Honor said. It is a -- I mean, as Your
19 Honor noted in the Telegin (ph) case, it is a factual
20 determine -- it's based -- whether a prejudgment interest is
21 appropriate in a case is based on the facts and
22 circumstances of that particular case.

23 My understanding is that Your Honor would
24 consider, among other things, whether that defendant was
25 unjustly enriched and whether it -- a future factor would be

1 whether it would promote settlement.

2 Now those facts and circumstances as to Mr. Cohen
3 and what he did with the transfers from BLMIS and whether he
4 invested that and made \$2 million that we don't know about
5 would be relevant to that determination in that particular
6 case. And unless these folks want to put forth 57 other
7 scenarios --

8 THE COURT: Well --

9 MR. CREMONA: -- then how can we --

10 THE COURT: No. I wouldn't allow that. But as I
11 understand it, they want to intervene and argue that as a
12 matter of law, for example, you must -- you can only collect
13 the federal judgment rate, not the New York State interest
14 rate, which would apply to all cases regardless of the
15 outputs.

16 MR. CREMONA: I understand that point, Your Honor.
17 I think the -- there's another problem with that.

18 THE COURT: Let me ask you a question. Are you
19 going to seek -- do you care about interest in this case?

20 MR. CREMONA: My -- you just took the point from
21 me, Your Honor, is I think it's completely premature. We
22 haven't discussed whether we would brief that, whether it's
23 -- if it is relevant and if we get to that point. But we're
24 not there yet. So I think that also belies their request
25 which is premature.

1 And if I could, Your Honor, I would just also
2 touch upon the fact -- well, I also want to focus on one
3 other transcript that -- where we had the same discussion
4 with Mr. Kirby and Your Honor on 4/9 when they last tried to
5 intervene on the discreet issue of SIPA 78fff(2)(c)(3). And
6 Your Honor said to Mr. Kirby, "Issues will arise at every
7 turn." I have a copy of that transcript and I'm happy to
8 furnish it to the parties. "Issues will arise at every
9 turn. Where does it stop?"

10 So here we are, you know, a year and a half later
11 and where does it stop, Your Honor? I mean, there always
12 are going to be issues that have to be decided and unless
13 you are precluded from deciding an issue until the last
14 defendant is heard on that issue, these cases can't move
15 forward.

16 And, again, I'm back to allowing them to proceed
17 at -- the way they have under the procedures that are in
18 place has resulted in a tremendous amount of progress and
19 allowed us to make significant recoveries for the net loser
20 victims. And to -- to turn that litigation procedures on --
21 order on its head now would do tremendous damage to that and
22 severe prejudice to those victims, which I think is a factor
23 that Your Honor should consider in -- under permissive
24 intervention under 7824.

25 So, again, I think one of the factors that was --

1 one of the things we did not hear and Your Honor asked and I
2 still did not hear how their interests are not adequately
3 protected or preserved by Mr. Cohen's counsel. And, in
4 fact, I think Mr. Lewis even admitted they're going to take
5 this all the way to the Second Circuit. So why aren't they
6 adequately protected and preserved. Unless they're going to
7 raise something that's entirely different factually that
8 would require a factual record, then they are adequately
9 protected.

10 And if they're not and if what they want to do is,
11 in fact, do that, then we will be severely prejudiced
12 because even as Your Honor knows, we may get one brief that
13 deals with 57 different cases, but from your experience with
14 the omnibus proceeding, that delayed matters extensively in
15 terms of having to deal with 230 motions as opposed to what
16 we started out with, 45.

17 And back to what Mr. Kirby said on 2/14, what we
18 talked about there on a consolidated briefing actually did
19 happen. That happened in your omnibus good faith proceeding
20 to wrap things up once and for all. But yet again that
21 wasn't good enough. The ruling isn't what they want, so
22 they want to reconsider the issue yet again. And I would
23 submit to Your Honor we can't have a fourth reconsideration
24 of antecedent debt.

25 THE COURT: My sense is, at least from Mr. Schweb

1 said, not necessarily what Mr. Levy said, that they're not
2 really looking for reconsideration so much as a fast track
3 to the Second Circuit.

4 MR. CREMONA: Again, Your Honor --

5 THE COURT: The question is whether that is an
6 appropriate reason to intervene.

7 MR. CREMONA: Is that not a procedurally improper
8 mechanism as you noted. Again, if there's any gamesmanship
9 going on it seems that to try to make that happen as opposed
10 to letting these cases proceed at pace.

11 Another factor that they didn't address is they're
12 not prejudiced in any way whereas we would be tremendously
13 prejudiced. They, as you said, have had their day in court
14 on antecedent debt. They will have their day in court in
15 their various adversary proceedings on prejudgment interest
16 and they can say why it is or isn't appropriate in that
17 particular case to the extent we aren't able to resolve
18 those cases through the procedures that are in place,
19 through an effective mediation or otherwise. And I would
20 submit that those procedures should made -- be maintained.

21 And just -- I mean, in closing, Your Honor, I
22 think there are -- if I could just look at my notes because
23 there was a lot of ground covered.

24 (Pause)

25 MR. CREMONA: You know, and there was a fairness

1 issue raised, Your Honor. You know, I would again say
2 what's not fair here is to prevent further delay and allow
3 -- and preventing us to allow a return to net loser victims.
4 That's where the prejudice lies.

5 In closing, I would just say that as I mentioned
6 the litigation procedures orders were -- order was entered
7 after careful consideration by this Court. It has resulted
8 in tremendous progress in moving this case forward. I think
9 to allow these defendants to circumvent or to change the
10 nature of it is to allow them to supplant the judgment of
11 this Court --

12 THE COURT: But they're not changing the nature of
13 it. They're just looking to in -- for leave to intervene.

14 MR. CREMONA: Well, they're skipping all the
15 processes that are embedded in the order. They're saying,
16 we don't think we should go through discovery. We don't
17 think we should go through mediation. We think we should
18 fast track the case to the Second Circuit.

19 THE COURT: Well, they still have to try the facts
20 of their cases.

21 All right. I got it.

22 MR. CREMONA: Thank you, Your Honor.

23 THE COURT: Let me hear from Mr. Bell.

24 MR. BELL: Your Honor, Kevin Bell for the
25 Securities Investor Protection Corporation. In the words of

1 Lawrence Peter Berra (ph), déjà vu all over again, you know,
2 Valentine's Day 2014, back in September, October and
3 November 2010, at the appellate argument before Judge
4 Englemeier (ph) 13 days ago. When will it stop?

5 We have one case that's ready for trial. You
6 asked if we go back to that transcript on Valentine's Day
7 2014. You asked the question of Mr. Cremona, when will it
8 end. You know, we're going to go to the lowest common
9 denominator. We have 57 cases. I'm glad Mr. Schweb put a
10 dollar to them. The trustee has 514 good faith cases where
11 he's seeking about \$1.15 billion. To money you have said in
12 the Merkin (ph) decision essentially strict liability.
13 We've had antecedent debt three or four times decided.

14 Clearly, this is \$1.15 billion that the trustee
15 doesn't have to give to those poor folks who didn't get
16 their money back. This is all fictitious profits these
17 folks have. People didn't get their principal. Today is
18 day 2,486 in the Madoff saga and it's 2,486 days that these
19 folks do not have the fictitious profits that the clients of
20 these lawyers have. There are 57 cases. Some of them
21 haven't even moved to a case management order.

22 Your Honor, SiPC supports the trustee's position.

23 THE COURT: All right. Thank you.

24 I've heard enough.

25 Look, you can make your motion. I think you're

1 going to be hard-pressed to convince me that you have any
2 further right to be heard, at least in this Court on the
3 antecedent debt issue. I don't know what you have in mind,
4 Mr. Levy. If you have something to say, I'll hear it
5 obviously.

6 MR. LEVY: Thank you, Your Honor.

7 THE COURT: And I don't think that Rule 24 is
8 intended to give you a fast track to the Second Circuit
9 where you have your own case and can litigate your own
10 issues.

11 I'm not going to enter a final judgment in this
12 case. I'm just going to make recommendations to the
13 District Court unless Mr. Cohen changes his mind and
14 consents to the entry of the final judgment.

15 But, you know, you can make your motion. I'm not
16 going to permit anybody to ask any questions or intervene in
17 a trial proceeding. This is really a post-trial issue.

18 Another point that nobody raised, which you should
19 bear in mind, is if an issue doesn't arise in the Cohen
20 case, or Mr. Cohen for some reason decides to wait either
21 expressly or implicitly by not raising it, I'm not going to
22 hear other parties on that issue. It's not going to be
23 decided. So bear that in mind.

24 And maybe particularly on the interest issue it
25 makes sense to see what issues the trustee does raise. The

1 trustee may decide, you know what, the interest doesn't
2 matter in this case. They're telling me the guy doesn't
3 have a million dollars anyway, so it doesn't make a
4 difference if I get a judgment for a million dollars or two
5 million dollars or three million dollars. So I'm not going
6 to decide that issue if that's the track the trustee takes.

7 But go ahead and make your motion. As I say, it
8 doesn't have to be decided before the trial anyway because
9 the trial is going to go forward unless the case is settled.

10 MR. CREMONA: Your Honor, we just wanted to
11 understand the timing because we're obviously under
12 compressed timing.

13 THE COURT: It's not going to effect the trial.
14 At most it will affect post-trial proceedings, and I really
15 have to know what the issues that are raised and are going
16 to be decided in the trial before I even consider what they
17 can intervene in.

18 MR. CREMONA: I fully understand that, Your Honor.
19 I don't necessarily think that it's right, but I'm just
20 thinking how do we deal with that effectively while we're on
21 trial or preparing for trial.

22 THE COURT: Well, you try your case.

23 MR. CREMONA: And then we'll just -- we'll deal
24 with this entirely post-trial?

25 THE COURT: Yeah. You try your case and Mr. Cohen

1 may win, in which case all of this is academic, or Mr.
2 Cohen, as I said, may decide to waive issues in which case I
3 won't hear particular issues. You may decide not to press
4 certain issues. And I -- as I said, I have a serious
5 question about whether Rule 24 is -- which is obviously
6 designed at least in the case of the antecedent debt issue
7 to get a fast track to the Second Circuit is an appropriate
8 use of Rule 24 because once the issues have been decided,
9 they've been decided and there's no need to intervene on
10 those particular issues.

11 MR. CREMONA: Understood. Thank you, Your Honor.

12 THE COURT: Okay. Thank you.

13 (Chorus of thank you)

14 (Whereupon, proceedings concluded at 10:53 a.m.)
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C E R T I F I C A T I O N

I, Sherri L. Breach, certify that the foregoing transcript
is a true and accurate record of the proceedings.

Sherri L
Breach

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DN: cn=Sherri L Breach, o, ou,
email=digital1@veritext.com, c=US
Date: 2015.10.01 12:20:03 -04'00'

Sherri L. Breach

AAERT Certified Electronic Reporter & Transcriber CERT*D-397

Date: September 30, 2015

Veritext Legal Solutions

330 Old Country Road

Suite 300

Mineola, NY 11501